AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012
Black Canyon Conference Center
Phoenix, Arizona

LOWER COURT APPEALS

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Outline for Presentation on Appeals
by William F. Mills

I. Appeals

A. What can you appeal? What changed on December 12, 2008?

1. A.R.S. § 13-4032(1)-(7) provides the answers. You may appeal:

An order: 1) **dismissing your case or a count of your case**, 2) granting a new trial, 3) on a question of law adverse to the state when the defendant was convicted and appeals from the judgment (cross-appeal), 4) made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request, 5) a sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A, 6) **granting a motion to suppress the use of evidence**, 7) a judgment of acquittal of one or more offenses charged that is entered after a verdict of guilty offenses.

2. *State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App 2008), changed the playing field in a major way. Discovery sanction "suppression" of evidence can no longer be appealed. You will have to attempt a special action instead. Former authority under *State v. Rodriguez*, 160 Ariz. 381, 382-83, 773 P.2d 486, 487-88 (App.1989) division one, was disavowed by division two in this case and later was expressly agreed to by division one in *State v. Roper*, 225 Ariz. 273, 236 P.3d 1220 (App. 2010).

B. How to begin? How much time do you have to file a notice of appeal? Is it jurisdictional? Calendar or work days?

1. Criminal Rules of Procedure, Rule 30.1(b) specifies that appeals on the record are governed by the Superior Court Rules of Appellate Procedure - Criminal (SCRAP-CRIM). SCRAP-CRIM became effective in June of 2003. Rule (1)(a) explains that these rules control all criminal action appeals from the justice or municipal courts to the superior court. Rule 1(b) says that the Criminal Rules of Procedure for appeals from superior court to the court of appeals & supreme court govern where these rules do specify a procedure, insofar as that is practicable. Rule 3 says to file your notice of appeal with the trial court. Rule 4 says you have 14 calendar days (not work days) after the entry of the order, judgment of sentence appealed from. (Except for delayed appeals, see Criminal Rule 32.) Rule 1(e) explains start and stop days.

2. A timely notice of appeal is the one thing that is jurisdictional and cannot be waived. *See* Arizona Appellate Handbook, Vol 1-B, §4.2.3.1, p.4.8; and *State v. Dawson*, 164 Ariz. 278, 281, 792 P.2d 741, 744 (1990); *State v. Johnson*, 78 Ariz. 211, 212-12, 277 P.2d 1020, 1021-22 (1954); *State v. Rodriquez*, 27 Ariz. App. 689, 690, 558 P.2d 717, 718 (1976).

C. What about mailing? If the court mails you notice of the ruling, e-mail, U.S. postal service, interoffice mail, pick-up basket, etc., what then? Rule 1(e) says in part, "Except as stated by these rules or by order of court in a particular case, the filing deadline for motions, responses, and memoranda, are not enlarged when sent by mail.

1. You get 5 more days! Rule 1(e) does not address a notice of appeal deadline. By operation of Rule 1(b), and Criminal Rules of Procedure,. Rule 1.3(a), which in part says, "Whenever a party has a right or is required to take some action within a prescribed period ... and such service is made by ... (rules omitted, basically it means by mail - which means by any method other than same day hand delivery), *five days shall be added to the prescribed period.*" Id. (*Emphasis provided*). More importantly in *State v. Rabun*, 162 Ariz. 261, 782 P.2d 737 (1989), our Arizona Supreme Court, reviewed this very issue and ruled that the 5 day extension of Rule 1.3(a) is applicable to the time to file a notice of appeal by the State. There, the attorneys for the parties were not in court and the superior court dismissed the charges from the Coconino County Grand Jury by minute entry dated November 30, 1987, but put the state's copy in the county attorney's mailbox in the courthouse. The state would otherwise have been 2 days late in filing its notice of appeal on the 22nd day after the order was filed. The court expressly concluded:

> Because we have already passed on this issue in Savage and Duran and have no wish to upset the accustomed and approved practice that has lead counsel to believe they have five additional days to file notices and petitions, (in those matters) we hold that Rule 1.3 applies to Rule 31.3 just as it does to Rules 10.2 and 32.9, both of which also prescribe time running from an event.

D. What about the record on appeal and the use of transcripts typed up by your office secretary or the defense attorney's secretary? (No & Yes)

1. Rule 1(f) defines an "authorized transcriber" as a, "certified court reporter of a transcriber under contract with an Arizona court." Rule 7 requires the appellant to make arrangements with authorized transcriber(s) to pay for the record on appeal. However Rule 8 allows the parties to stipulate to a substitute, so if you agree, then someone else could prepare either a transcript or joint statement of facts and issues.

E. You need more time to finish your appellant's or appellee's memorandum. What do you do? Who do you ask? Do you need a stipulation from your opposition?

1. Rule 8(b) holds the answers. You simply ask a trial level judge (presiding is good) other than the one who presided over the issue on appeal, and show good cause. No response is allowed, "unless authorized by the court." So while it is a good practice to get agreements for extensions of time, they are not required.

F. What is a "Procedural Motion" and why and how should I use one?

1. Nine years after they were created, they are the least understood by superior court clerical staff and some others. They are any motion that could determine whether the appeal goes forward, e.g. a motion to dismiss for late notice of appeal, no right to appeal, appeal after a plea, and they can be made any time after a notice of appeal has been filed. Rule 8(c)(1)

2. A few process points first, per Rules 8(c)(1)&(3), they are filed in your trial court, and can be answered within 14 days by the other side, but are to be captioned as if they are filed in superior court, and must bear the notation in the caption "Procedural Motion - Refer to Superior Court," and are ruled upon by the superior court. After the answer is filed, or the 14 day period after the motion was filed expires, the lower court clerk is to transmit only the motion and any answer to the superior court. Rule 8(c)(5). No reply is allowed, except with permission from superior court (not the trial court). No oral argument is allowed, except with permission from superior court. No record on appeal goes with this, so pay attention to the last part of Rule 8(c)(3), "The parties shall refer specifically to the record as needed and attach such documents as support the motion or response." In other words, make your own record, restricted to just the issue in the motion.

3. Notice in Rule 8(c)(4), that all briefing and record preparation deadlines are suspended while the procedural motion is pending. Under Rule 8(c)(5), the superior court shall direct the remainder of the appeal, if any; including those deadlines. If the appeal continues, it will ask the trial court to forward the record as appropriate.

G. So the court tape recorder or CD recording failed, what now? Trials *de novo*?

1. Can you and your opposition use Rule 7(b) to agree about what the record was at the evidentiary or legal hearing or the trial? If so you can stipulate and proceed. If the record is not sufficient to proceed, be aware that there is a disconnect in the rules. You can first approach the trial court judge, under Rule 7(g), to see if the judge agrees that the record is insufficient for an appeal on the record. If so, the trial court may, on its motion, or a party's motion reset the matter for a new trial (or hearing) within 45 days from such a determination. If such a retrial or rehearing is held, then any appeals rights begin to run anew from the entry of judgment following such rehearing or retrial. Rule 7(g) further expressly provides:

> In cases where it appears that the trial record is insufficient, the preference shall be for a new trial at the trial court level. Notwithstanding the foregoing, cases summarily transferred to the superior court for trial de novo or determined by the superior court to have an insufficient record (Rule 2(b) & Rule 10(b)?) may be remanded to the original trial court for a new trial or hearing in lieu of a trial de novo in superior court. Unlike the parties in a trial de novo held in superior court, the parties in a case remanded pursuant to this rule for a new trial in the original trial court shall have the rights of appeal as provided by statute or rule for all litigants following a trial or the entry of an appealable judgment or order.

2. So if you end up doing a rehearing or re-trial at the trial level, you get new rights of appeal from the conclusion of that process. Remember the old style trial de novo in superior court is a form of appeal, and except for the facial validity of a statute, rule, ordinance, etc., there will be no further appeal. Rule 13(b), Criminal Procedure Rule 31, & A.R.S. §22-375.

3. However, be aware of the potential conflict with Rule 10(b), which was not modified to be congruent with newly modified Rule 7(g), above. Rule 10(b) is a hold-out from when most appeals were nearly universally by trials de novo in superior court, because the lower courts did not make a record of the proceedings. It provides that when the trial court record is not sufficient or not available, that the trial court shall notify the parities and summarily transfer the case to superior court for a trial de novo. If your case goes this route, there will be a re-trial in superior court and no appellate briefing need be done.

H. The defendant was convicted, sentenced and filed his notice of appeal, now what about enforcement of the sentence, probation, restitution, fines & fees during the appeal?

1. The process was changed, from when just the jail part of the sentence was stayed for misdemeanors under the Criminal Rules of Procedure to SCRAP-CRIM, Rule 6. Rule 6(a) basically says if the D is released ROR or on bail when convicted, the D remains in the same status as before, under Crim. Rule 7.2. If he is in custody, he stays in custody, and receives credit for his time, just as if no appeal had been filed. Rule 6(b). Rule 6(c) is critical. If the D is ROR or out on bond, then his complete sentence (not just the jail part) is stayed while the appeal proceeds: "'Sentence' shall include any fine, jail term, or other penalty, including a term of probation, imposed by the court." However, "Notwithstanding the foregoing, an order requiring the payment of restitution shall not be stayed, but during the pendency of the appeal restitution payments shall be paid to, and held by, the clerk of the court."

I. When are the appellant's and appellee's memoranda due?

1. Rule 8(a)(2), the appellant's brief is due, 60 calendar days from "the deadline to file the notice of appeal." Say you are the appellant, had 14 days from the order to suppress for lack of RS to stop the car for DUI, and you filed the state's notice of appeal on the 10th day after entry of the order of suppression, you still get the entire 14 day time period. (Always double-check your math!) Or think of it as 74 days from the entry of the order you are appealing from (plus 5 days if by mail).

2. The appellee's brief is due 30 calendar days from "the filing date" of the appellant's memorandum. (Not when you received it!) Please note, "No reply memorandum shall be filed unless authorized by the Superior Court." Rule 8(a)(2). So only ask for it in unusual cases.

J. What goes into an appellate memorandum?

1. Rule 8(a)(3), both the appellant and appellee's memoranda are required to include: "[A] short statement of facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal." If your opposition does not fulfill these requirements, you can file a procedural motion (Rule 8(c)) to strike the pleading, and possibly dismiss the appeal.

2. Rule 8(a)(4) limits your double-spaced memorandum to 15 pages, unless you use Rule 8(a)(5) to modify or waive this requirement in your more complex cases. (You may file the motion for permission to exceed the page limit either before your extended memorandum, or simultaneously - depending upon your risk tolerance and the attitude of your superior court judges!)

K. Oral argument. Do you get it?

1. Rule 11(a) allows the superior court to set oral argument, but says it "[S]hall do so upon request of a party." Just make sure to put your request for oral argument in the caption of your appellate memorandum, in order to lock in your request as a mandatory one.

L. You lost. Are you done?

1. Rule 13(a) provides that either party may file a motion for rehearing of a final order on appeal, with the superior court, within 14 calendar days after service of the decision or order. (You can not do this for an order denying a motion for rehearing. Could you file a motion for a rehearing if the court grants your opponent's motion for rehearing?) Answers must be filed within 14 calendar days of the filing of the motion. (Not receipt!) No oral argument is allowed, unless requested by the court.

2. Either there was no motion fo rehearing, or it has now been decided. Where do you go from here? Rule 13(b) tells us there is no further appeal from a final decision or order, *unless* you are pursuing an issue allowed by A.R.S. §22-375. That law provides only for the appeal of the facial validity of the law (not as applied) *State v. Singer*, 190 Ariz. 48-50, 945 P.3d 359, 361 (App. 1997), and expressly says that otherwise there shall be no further appeal. (If you are eligible, follow the process outlined in the Criminal Rules of Procedure, Rule 31.)

3. But you still feel the next higher court needs to grant you relief from the horribly wrong-headed superior court decision against your virtuous legal position. So welcome to the fascinating world of special actions. They are not of right. Your greatest challenge will be to lure the appellate court into taking discretionary jurisdiction of your legal issue(s).

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